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Date: December 28, 2000

Case No.: **1994-LHC-0822**

OWCP No.: **5-61489**

BRB No.: **1999-0704**

In the Matter of:

TERRY W. CAMPBELL,
Claimant,

v.

NORFOLK SHIPBUILDING AND DRYDOCK CORPORATION,
Employer,

and

RICHARD FLAGSHIP SERVICES INCORPORATED,
Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-In-Interest.

DECISION AND ORDER ON REMAND GRANTING PERMANENT TOTAL DISABILITY FROM OCTOBER 19, 1992 TO JANUARY 9, 1993 and GRANTING PERMANENT PARTIAL DISABILITY FROM SEPTEMBER 13, 1993 TO DECEMBER 10, 1993

In a decision and order issued on April 7, 2000, the Benefits Review Board stated that the Employer

> did not establish suitable alternate employment by virtue of the light duty job at its facility. Inasmuch as the job was not suitable for claimant, he is not precluded from obtaining total disability benefits despite his discharge from the job for excessive absenteeism. Thus, the Board affirmed the award of total disability benefits for the periods when claimant was not working.

The Board held that payments of permanent total disability should commence on October 19, 1992, subject to subsequent earnings.

The Board noted that Campbell apparently worked from October 19, 1992 to January 9, 1993 and from September 1993 through December 1993.

The Board remanded the

> case for further consideration of the extent of claimant’s disability for the periods of time he was working part-time in the light duty job for employer from October 19, 1992, through January 9, 1993, and for a different employer from September through December 1993. If the administrative law judge does not find that claimant was working only through extraordinary effort and in spite of excruciating pain, or for a beneficient employer, he should consider claimant's entitlement to partial disability benefits for these periods. In awarding partial disability benefits, the administrative law judge must determine claimant's loss in wage-earning capacity pursuant to Section 8(h) of the Act, 33 U.S.C. §908(h), taking into account that claimant's light duty job at employer's facility was too physically demanding for him and outside his work restrictions, as we have affirmed these findings, and that claimant may have worked in pain at Savage Builders. See Ramirez v. Sea-Land Services, Inc., 33 BRBS 41, 45 n.5; Ezell, 33 BRBS at 26-27.

Claimant’s counsel argues that

> In this case, the claimant clearly only was able to work due to extraordinary efforts. Even just getting to work required an incredible effort. The claimant's doctor informed the Shipyard that the claimant was prescribed medication for his pain that would cause him to oversleep. (Tr.-1, Pg. 28, 30). Yet the Shipyard continued to schedule him for early morning shifts of seven a.m. to eleven a.m. (Tr.-1, Pg. 26, 27). The claimant lived forty miles each way from work and was prescribed significant pain medication which impeded his ability to drive. Claimant exhausted all efforts to find other modes of transportation to and from work.
>
> Once at work, the claimant was required to work outside of his work restrictions and stated that he had difficulty performing these tasks. He specifically was prescribed no work with handheld tools and no bending and stooping. (Tr.-1, 25). The claimant was expected to perform tasks that his treating physician had prohibited, yet through extraordinary efforts, he did perform these tasks albeit with excruciating pain. (Tr.-1, Pg. 28, 29, 30). This is illustrated by the fact that he had to "eat a whole bunch of pills during the daytime when I was working just to keep the pain down until I could get out of there". (Tr.-1, Pg. 43). Clearly, claimant was only able to comply with the Shipyard's demand of employment by extraordinary efforts and withstanding excruciating pain.

The Claimant reports that at Savage Builders he had to sit extensively. He had to sweep and dump cans which violated the restrictions against lifting and the use of hand tools.

The Employer reports that the Claimant

> has not offered any facts or assertions on which to conclude that he worked through extraordinary effort or in spite of excruciating pain. Despite Claimant's statements that the light-duty work that he was performing would cause pain through his neck, across his shoulders, and underneath his shoulder blades, and that this pain caused headaches, he has not asserted that the pain became excruciating or

> that it rose to a level that required an extraordinary effort to work. (TR1 29-30.)[1]
>
> The Employer states that the Claimant is not
>
> entitled to total disability benefits on the basis that he worked for a beneficent employer or in sheltered employment. Claimant has never made such allegations and the record does not support such a finding. Instead, the record shows that the work done by Claimant was regular and necessary. The evidence also definitively establishes that the Employer accommodated Claimant's work restrictions by allowing him to rest as needed and by providing support for selected tasks.
>
> With respect to Claimant's work at Savage Builders, Claimant presented no evidence that shows that he worked only through extraordinary effort or in excruciating pain. Claimant testified that he supervised the loading of trucks at Savage Builders, but left there because work was slack and he did not feel that he could handle it. (TR1 37-38.). There is no contemporaneous medical evidence to support Claimant's assertion that he was unable to do the work.

Evaluation of the Evidence

EX A indicates that Campbell was paid temporary partial disability between October 2, 1992 and December 13, 1992 for ten and 3/7 weeks for a total amount of $2512.04. He was paid temporary total disability from December 14 to December 30, 1992 in the amount of $1029.88. Between December 31, 1992 and January 3, 1993 he was paid 4/7 of a week of temporary partial disability in the amount of $74.51.

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[1] *The following abbreviations will be used: "TR1" for the transcript of the September 20, 1994 hearing; "TR2" for the transcript of the December 12, 1996 hearing; "CX" for Claimant's Exhibits; and "EX" for Employer's Exhibits.*

EX A reflects the average weekly wage as $636.11 with a compensation rate of $424.07 per week.

In EX B, answers to interrogatories, the Claimant stated that he was

> employed by Savage Builders from approximately September 13, 1993 to approximately December 10, 1993 and earned a total of $1,156.00. In dividing this amount by 13 weeks, the claimant reportedly earned an average of $88.00 per week. An IRS form 1099 confirms those earnings for 1993.

On June 1, 1992, Gary G. Suter, M.D., a neurologist reported

DIAGNOSIS: Chronic cervical sprain

TREATMENT: Restricted to light, limited duty three to four-hour day, three days a week. No hand-held equipment or operating vehicles or driving when taking medication.

WORK STATUS: 7/12/90 - Same

RETURN APPOINTMENT: December 3, 1992

In October 1992, Dr. Suter informed the Claimant's counsel of that date that

> I have not seen Mr. Campbell since June 1 of this year. Nevertheless, it was my opinion then that he was able to do light work and that he could do this half time. If he does half a day at a time, five days a week, I would think that would be reasonable. If, on the other hand, he wanted to consider trying two full days of light work and a half day, that might be reasonable. In any case, when I saw him in June, it was my thought that he could indeed do 20 hours of work a week as long as it was light work.
>
> As far as driving is concerned, I would think he could drive an hour at a time though obviously this adds some stress and strain to the situation.
>
> In the past, Mr. Campbell claimed that the shipyard would not offer him the light work, and if the shipyard does indeed offer to have him do light work 20 hours a week, I think it might be best for him to do that.

In early December 1992, Dr. Suter stated that

> Mr. Campbell is seen for a follow-up visit. He still has some pain in his neck and arms. He still has spasms in his trapezius muscles and in his paraspinal muscles. He complains of some pain into

the right arm at times when he is working in a reaching or stretching situation.

It has been my opinion that he can do light work four hours a “week,” and apparently he has been doing this. He says he has some increase in neck and arm pain as a result, but not tremendous change.

The main problem has to do with the extra medicines he takes when he has extra pain and extra headache. These are to some degree sedative and they would conceivably interfere with him driving. He says that on one occasion driving back and forth he has hit the guard rail when he dozed off.

I think we will have to say that his regular medicine which consists of Robaxisal tablets, two twice a day, and Atenolol 50 mgs each morning probably is a safe medicine as far as driving is concerned. However, if he takes his prn medicine which is Fiorinal tablets, Valium, and Percodan, or some combination of these, then I do not believe it would be safe for him to drive. Unfortunately, I think he does need these prn medicines from time to time.

Ideally he should take them only after work and not in the morning before work or at work.

It would certainly seem reasonable that an attempt should be made to work out some rehabilitation of this patient so he can go to some other type work or have some other type arrangement that does not require driving for long distances to get to work. I do not know the solution to this problem. However, I do not think it is safe for him to drive when he is taking certain combinations of medicine for his post-traumatic headache and his cervical spine pain. I have discussed this matter with the patient and told him what I think about it.

On January 5, 1993, Dr. Suter reported that

Mr. Campbell is under my care-for post-trauma cervical spondylosis and post-trauma vascular headache. The medications being prescribed to him

> for these conditions may at times cause Mr. Campbell to over sleep.

Mr. Campbell was seen in the shipyard clinic on several occasions in 1992. On October first the Claimant reported that the neck was better, and he was cleared for working four hours a day and for driving a car. On October 21, he complained of muscle cramps and medication was prescribed. In mid-November refills were provided for cafergot, fiorinal, percodan, and valium.

On December 4, 1992, Campbell was referred to Dr. Suter because of neck complaints. Campbell made similar complaints on December 14 and 30, 1992. Medication refills were provided on the later date. [EX E]. EX F consists of shipyard writeups for tardiness and absence between late October 1992 and early January 1993. On several occasions, Campbell gave the effects of medication as an excuse.

Dr. Suter examined Campbell in June 1993 and prescribed medications at that time and again in October 1993.

Campbell was seen on December 6, 1993 and Dr. Suter stated that with the use of medications that Claimant could perform light work for four hours a day. It was reported that Campbell had not been able to afford medication since early that year. In August 1994, Dr. Suter stated that Campbell was totally disabled due to headaches.

Dr. Suter was deposed in December 1994 and in December 1996. In 1994, Dr. Suter testified that Campbell could drive when taking some of the medications. However, other medications were to be taken in the evening to avoid an impact on his driving.

At the hearing in 1994, Campbell testified that his job in late 1992 was to test drop cords and to remove broken light bulbs from sockets. He used hand held equipment and had to stoop and bend. Campbell took numerous medications and had been known to fall asleep on the job.

Campbell stated that at Savage Builders

> I was working under my doctor’s restrictions. I was working four hours a day with no lifting or nothing

> like that. I've got a lot of past experience in the construction field, and all I would do is just supervise the loading of trucks, you know, just sit there and just look in the trucks and make sure whatever job they was going on they had the right equipment. And then I would push a broom or empty a trash can.

He left Savage as "I just couldn't handle it. And the work got slack ... it was getting wintertime." [TR1, pp. 37-38].

Discussion

The Board has held that during late 1992, the Claimant's job was not suitable alternate employment. However, in order for total disability benefits to be paid while Campbell was working there must be a finding that he worked only through extraordinary effort and in spite of excruciating pain, or worked for a "beneficient" employer.

The Employer has clearly spelled out that the job was necessary to the operation of the shipyard and that others have continued to perform such work. While the shipyard made some accommodations during this period, it is apparent that the shipyard was not a beneficient employer.

Campbell's credibility is quite questionable in this case. However, Dr. Suter prescribed numerous medications in late 1992. In addition, Campbell made numerous trips to the clinic and requested additional medications during this time. I find that Campbell worked only through extraordinary effort and in spite of excruciating pain on the days that he worked from October 19, 1992 through January 9, 1993.

Therefore, Campbell is entitled to permanent total disability during this period.

Campbell has indicated that he had similar problems during his work for Savage Builders form September 13, 1993 to December 10, 1993. The file does not contain records from Savage that indicate that Campbell had problems while working there.

Campbell did not see a physician during this time period and later informed Dr. Suter that he did not have any medications during late 1993.

While Campbell may have worked for minimum wage at Savage there is no evidence that this firm was a beneficient employer. Likewise, there is no indication that Campbell performed only through extraordinary effort. Therefore, he is entitled to no more than permanent partial disability while he worked for Savage.

Order

1. The Employer shall pay the Claimant permanent total disability from October 19, 1992 to January 9, 1993.

2. The Employer shall pay the Claimant permanent partial disability from September 13, 1993 to December 10, 1993 at a rate which will reflect his earnings at Savage Builders.

3. Payments for other periods of time remain in effect.

4. The Employer shall not be liable for penalties until ten days after notice from the District Director as to the amount to be paid.

5. The Employer shall receive credit for all compensation that it has already paid for those periods.

6. Interest at the rate specified in 28 U.S.C. §1961 in effect when this Decision and Order is filed with the office of the District Director shall be paid on all accrued benefits computed from the date each payment was originally due to be paid. See Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984).

7. All computations are subject to verification by the District Director.

8. Claimant's attorney within 20 days of the receipt of this order, shall submit a fully supported fee application, a copy of which shall be sent to opposing counsel, who then shall have ten (10) days to respond with objections thereto.

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/ccb
Newport News, Virginia